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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Victor David Perez Peralta,

No. CV-23-00358-PHX-JAT

10 Plaintiff,

ORDER

11 v.

12 Custom Image Pros LLC, et al.,

13 Defendants.

14
15 Pending before the Court is Victor Peralta’s (“Plaintiff”) Motion for Default
16 Judgment. (Doc. 11). The Court now rules on the motion.

17 **I. BACKGROUND**

18 Timothy Simpson and Jane Doe Simpson own and operate Custom Image Pros LLC
19 (collectively, “Defendants”). (*See* Doc. 1 at 4). Defendants’ business “is an image
20 marketing, design[,] [and] production company.” (*Id.* at 6). Plaintiff worked for Defendants
21 from approximately February 1, 2023 to February 8, 2023, “making luminous letters for
22 signs, putting lights on letters, and assembling letters for signs.” (*Id.* at 6, 8). During this
23 time Plaintiff worked for approximately 48 hours. (*Id.* at 8). For this work, Plaintiff was
24 supposed to be paid \$18 per hour worked. (*Id.* at 7).

25 On February 27, 2023, Plaintiff filed a complaint seeking relief for unpaid wages,
26 overtime wages, liquidated damages, and attorney’s fees under the Fair Labor Standards
27 Act (“FLSA”), the Arizona Minimum Wage Act (“AMWA”), and the Arizona Wage Act
28 (“AWA”). (*Id.* at 1–2). He alleges that Defendants failed to pay him any wages for the time

1 he worked at Custom Image Pros. (*Id.* at 9). Plaintiff served Timothy Simpson “for himself,
 2 for Jane Doe Simpson (Jamie L. Simpson), and Custom Image Pros LLC on March 1,
 3 2023.” (Doc. 11 at 2). Defendants failed to file an answer or response. Upon Plaintiff’s
 4 application, the Clerk of the Court entered default against Defendants on March 30, 2023.
 5 (Doc. 10).

6 On April 1, 2023, the parties entered a settlement agreement in which Defendants
 7 agreed to pay Plaintiff \$1,236 for damages and \$3,554 for attorneys’ fees and costs. (Doc.
 8 11-2 at 2–3). The settlement agreement also stated that “if the checks are not delivered on
 9 or before April 30, 2023, this agreement shall be null and void, and the [l]awsuit shall
 10 continue as though the parties never entered into this [a]greement.” (*Id.* at 3). On May 31,
 11 2023, Plaintiff filed the pending Motion for Default Judgment claiming Defendants have
 12 failed to pay him. (Doc. 11). No response has been filed.

13 **II. DEFAULT JUDGMENT**

14 Once the Clerk has entered default, a court may, but is not required to, grant default
 15 judgment under Rule 55(b) on amounts that are not for a sum certain. *Aldabe v. Aldabe*,
 16 616 F.2d 1089, 1092 (9th Cir. 1980) (per curiam). In considering whether to enter default
 17 judgment, a court may consider the following factors:

18 (1) The possibility of prejudice to the plaintiff, (2) the merits
 19 of plaintiff’s substantive claim, (3) the sufficiency of the
 20 complaint, (4) the sum of money at stake in the action; (5) the
 21 possibility of a dispute concerning material facts; (6) whether
 22 the default was due to excusable neglect, and (7) the strong
 23 policy underlying the Federal Rules of Civil Procedure
 24 favoring decisions on the merits.

25 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). When considering these factors,
 26 Defendant is deemed to have admitted all well-pleaded allegations in the complaint but
 27 does not admit allegations related to damages or those that do no more than “parrot” the
 28 elements of a claim. *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007).

29 **A. Possibility of Prejudice**

30 A possibility of prejudice exists when failure to enter default judgment denies a

1 plaintiff judicial resolution of the claims presented or leaves him without other recourse
2 for recovery. *Elektra Entm't Grp., Inc. v. Crawford*, 226 F.R.D. 388, 392 (C.D. Cal. 2005).
3 Because Defendants have not answered, Plaintiff will likely be left without recourse if
4 default judgment is not granted. Therefore, this factor weighs in favor of granting the
5 motion.

6 || **B. Merits of Plaintiff's Substantive Claim and Sufficiency of Complaint**

7 “The second and third *Eitel* factors address the substantive merits of the claim and
8 the sufficiency of the complaint and are often analyzed together.” *Joe Hand Promotions,*
9 *Inc. v. Garcia Pacheco*, No. 18-cv-1973-BAS-KSC, 2019 WL 2232957, at *2 (S.D. Cal.
10 May 23, 2019). These two factors favor entering judgment when, considering the complaint
11 and relevant documentary evidence, a plaintiff “state[s] a claim on which [he] may
12 recover.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978); *see also J & J Sports*
13 *Prods., Inc. v. Molina*, No. CV15-0380 PHX DGC, 2015 WL 4396476, at *1 (D. Ariz. July
14 17, 2015) (considering affidavits attached to the motion for default judgment).

15 Plaintiff seeks damages on his claims for overtime violations under FLSA, failure
16 to pay minimum wage in compliance with FLSA and AMWA, and failure to pay wages in
17 compliance with AWA. The Court addresses each claim below.

i. *Overtime Violations Under FLSA*

Under 29 U.S.C. § 207(a)(1), if an employee works “for a workweek longer than forty hours” they must be compensated “at a rate not less than one and one-half times the regular rate at which he is employed.” The Court must first determine if the Plaintiff was an employee within the meaning of FLSA. FLSA defines an “employee” as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1). It defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” *Id.* § 203(d).

26 Here, Defendants “ha[d] the authority to hire and fire employees, supervised and
27 controlled work schedules or the conditions of employment, determined the rate and
28 method of payment, and maintained employment records in connection with Plaintiff’s

1 employment.” (Doc. 1 at 4–5). These allegations, taken as true, support that all three
 2 Defendants were acting in the interest of the company and are employers under FLSA.

3 The Court next analyzes whether Plaintiff is an employee under FLSA. The Ninth
 4 Circuit Court of Appeals has traditionally employed a six factor “economic reality test” to
 5 distinguish between employees and independent contractors. *Real v. Driscoll Strawberry*
 6 *Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).¹ The six factors of the economic reality
 7 test are:

8 (1) the degree of the alleged employer’s rights to control the
 9 manner in which the work is to be performed; (2) the alleged
 10 employee’s opportunity for profit or loss depending upon his
 11 managerial skills; (3) the alleged employee’s investment in
 12 equipment or materials required for his task, or his
 13 employment of helpers; (4) whether the service rendered
 14 requires a special skill; (5) the degree of permanence of the
 15 working relationship; and (6) whether the service rendered is
 16 an integral part of the alleged employer’s business.

17 *Id.* No one factor in the test is dispositive. *Id.* Instead, the determination depends “upon the
 18 circumstance of the whole activity.” *Rutherford Food Corp. v. McComb*, 331 U.S. 722,
 19 730 (1947).

20 First, “Defendants supervised Plaintiff and subjected him to Defendants’ rules.”
 21 (Doc. 1 at 7). Second, Plaintiff was assigned an hourly rate and had no opportunity to share
 22 in the profit or loss of the business. (*See id.*). Third, there is no evidence to suggest Plaintiff
 23 invested in any equipment or materials to complete his assigned tasks. Fourth, there is also
 24 no evidence to suggest Plaintiff needed special skills to complete his tasks, which consisted
 25 primarily of manual labor. (*See id.* at 6). Fifth, Plaintiff was hired on an hourly basis with
 26 no long-term contract. (*See id.* at 7). Finally, “[t]he services rendered by Plaintiff in his
 27 work for Defendants was integral to Defendants’ business.” (*Id.*). The factors, taking

28 ¹ The Court notes that after *Real* was decided, the U.S. Supreme Court decided *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), which laid out a different set of factors for testing employee versus independent contractor. However, in FLSA cases, the *Real* factors, and not the *Darden* factors, control the test for whether an individual is an employee or independent contractor. *See Dyrhaug v. Tax Breaks Inc.*, No. CV-13-01309-PHX-BSB, 2015 WL 13567067, at *6 (D. Ariz. Sept. 15, 2015) (discussing the distinction between FLSA and ERISA cases when testing employee versus independent contractor).

1 Plaintiff's allegations as true, indicate that Plaintiff was an employee of the Defendants
 2 under FLSA even though Defendants classified Plaintiff as an independent contractor. (*See*
 3 *id.* at 7).

4 To state a plausible claim of an overtime violation under FLSA, a plaintiff must do
 5 more than "present[] generalized allegations asserting violations" of the overtime
 6 provisions." *Landers v. Quality Commc'nns, Inc.*, 771 F.3d 638, 646 (9th Cir. 2014), *cert.*
 7 *denied*, 575 U.S. 978 (2015). Rather, a plaintiff must plead specific factual allegations "that
 8 there was at least one workweek in which they worked in excess of forty hours and were
 9 not paid overtime wages." *Id.* Here, Plaintiff's complaint meets this burden because
 10 Plaintiff alleges to have worked forty-eight hours in one week and that he was not paid the
 11 overtime rate mandated by FLSA. (*See* Doc. 1 at 8). Accordingly, the Plaintiff has
 12 sufficiently stated a valid claim of overtime violations under FLSA.

13 *ii. Failure to Pay Minimum Wage Under FLSA*

14 Under 29 U.S.C. § 206(a), employers are required to pay employees no less than
 15 \$7.25 per hour. As discussed above, Plaintiff worked as an employee for the Defendants
 16 and alleges to have received no pay. (*See* Doc. 1 at 11). Thus, the Plaintiff has sufficiently
 17 stated a claim of failure to pay minimum wage under FLSA.

18 *iii. Failure to Pay Minimum Wage Under AMWA*

19 Under A.R.S. § 23-363(A), employers are required to pay employees no less than
 20 \$12 per hour. This amount shall be increased each year based on the cost of living. *Id.* § 23-
 21 363(B). AMWA defines an "employee" as "any person who is or was employed by an
 22 employer." A.R.S. § 23-362(A). AMWA defines an "employer" as "any corporation
 23 proprietorship, partnership, joint venture, limited liability company, trust, association,
 24 political subdivision of the state, individual or other entity acting directly or indirectly in
 25 the interest of an employer in relation to an employee." A.R.S. § 23-362(B). To determine
 26 whether a worker is an employee under AMWA as opposed to an independent contractor,
 27 AMWA instructs courts to look "to the standards of [FLSA]." A.R.S. § 23-362(D). AMWA
 28 places the "burden of proof . . . upon the party for whom the work is performed to show

1 independent contractor status by clear and convincing evidence.” *Id.* Defendants offer no
 2 evidence that Plaintiff was an independent contract because they have not responded to
 3 Plaintiffs allegations. Thus, under A.R.S. § 23-362(D), and using the same analysis the
 4 Court used for FLSA, Plaintiff was an employee under AMWA. Additionally, Plaintiff
 5 alleges to have received no pay. (*See* Doc. 1 at 11). Thus, the Plaintiff has sufficiently
 6 stated a claim of failure to pay minimum wage under AMWA.

7 *iv. Failure to Pay Wages due under AWA – Against Custom Image Pros Only*

8 Under A.R.S. § 23-351(C), on each payday, employers “shall pay to employees all
 9 wages due to the employees up to that date.” The AWA defines an “employee” as “any
 10 person who performs services for an employer under a contract of employment either made
 11 in this state or to be performed wholly or partly within this state.” A.R.S. § 23-350(2).
 12 Plaintiff claims that he worked for Custom Image Pros in Arizona. (*See* Doc. 1 at 3).

13 AWA defines an “employer” as “any individual, partnership, association, joint stock
 14 company, trust or corporation, the administrator or executor of the estate of a deceased
 15 individual or the receiver, trustee or successor of any of such persons employing any
 16 person.” A.R.S. § 23-350(3). “This statutory definition does not, in other words, authorize
 17 individual liability against the owners, officers, and directors of a corporate employer in a
 18 case where the claim is for the employer’s wholesale failure to pay wages.” *Rosen v.*
 19 *Fasttrak Foods LLC*, No. CV-19-05292-PHX-DWL, 2021 WL 2981590, at *5 (D. Ariz.
 20 July 15, 2021) (citing *Channel v. Home Mortg., Inc.*, No. CIV 03-00100-PHX-ROS, 2005
 21 WL 8160525, at *5 (D. Ariz. Sept. 21, 2005)). Plaintiff raises claims under AWA against
 22 Custom Image Pros only, not Timothy Simpson and Jane Doe Simpson. Custom Image
 23 Pros is a limited liability company and within AWA’s definition of employer. Plaintiff
 24 alleges that Defendant Custom Image Pros has failed to compensate him for wages due.
 25 (*See* Doc. 1 at 9). Thus, the Plaintiff has sufficiently stated a claim of failure to pay wages
 26 due under AWA.

27 Thus, the Court finds that Plaintiff has sufficiently stated a valid claim against all
 28 Defendants for overtime violations under FLSA, failure to pay minimum wage in

1 compliance with FLSA and AMWA, and against Defendant Custom Image Pros only for
 2 failure to pay wages in compliance with AWA. Thus, the second and third *Eitel* factors
 3 favor entry of default judgment.

4 **C. Sum at Stake**

5 “Under the fourth *Eitel* factor, the Court considers the amount of money at stake in
 6 relation to the seriousness of [a defendant’s] conduct.” *Bankers Ins. Co. v. Old W. Bonding*
 7 Co., No. CV11-1804 PHX DGC, 2012 WL 2912912, at *2 (D. Ariz. July 16, 2012). If the
 8 sum of money at stake is completely disproportionate or inappropriate, default judgment is
 9 disfavored. *See Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1071
 10 (D. Ariz. 2006). A district court has “wide latitude” in determining the amount of damages
 11 to award upon default judgment. *James v. Frame*, 6 F.3d 307, 310 (9th Cir. 1993).

12 Here, Plaintiff seeks damages for unpaid and overtime wages under FLSA, AMWA,
 13 and AMA, along with liquidated damages. (See Doc. 11 at 1, 8). Plaintiff requests damages
 14 total \$2,736, with only \$2,128.40 of that total against Timothy Simpson and Jane Doe
 15 Simpson. (See *id.* at 12). Additionally, plaintiff seeks attorney’s fees and costs. (See *id.*).
 16 The Court finds that the stated damages are not unreasonable or inappropriate based on the
 17 forty-eight hours Plaintiff worked. Accordingly, this factor weighs in favor of entering
 18 default judgment.

19 **D. Possibility of Dispute**

20 Considering the allegations that are now deemed admitted and the documentary
 21 evidence that Plaintiff submitted, “no genuine dispute of material facts would preclude
 22 granting Plaintiff’s motion.” *See PepsiCo., Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172,
 23 1177 (C.D. Cal. 2002). Thus, this factor weighs in favor of granting the motion.

24 **E. Excusable Neglect**

25 On the record, little possibility exists that Defendants’ default resulted from
 26 excusable neglect because Defendants were duly served. Additionally, Defendants signed
 27 a settlement agreement that stated they were aware of this lawsuit. (See Doc. 11-2 at 2).
 28 Consequently, this factor weighs in favor of granting the motion.

1 **F. Policy for Deciding on the Merits**

2 Although it is true that “[c]ases should be decided upon their merits whenever
 3 reasonably possible,” *Eitel*, 782 F.2d at 1472, that is made “impractical, if not impossible,”
 4 when a defendant fails to answer. *PepsiCo., Inc.*, 238 F. Supp. 2d at 1177. Thus, this factor
 5 does not preclude entering default judgment against Defendants.

6 **G. Conclusion**

7 On balance, the *Eitel* factors weigh in favor of granting Plaintiff’s motion for default
 8 judgment. Having concluded that entry of default judgment is appropriate under the
 9 circumstances, the Court will now turn to evaluate Plaintiff’s request for liquidated
 10 damages in the amount of \$2,736.

11 **III. DAMAGES**

12 Plaintiff requests \$2,736 in damages against Defendant Custom Image Pros, and of
 13 that \$2,736, an amount of \$2,138.40 against all Defendants, jointly and severally. (Doc. 11
 14 at 12). Of this total, \$2,592 is for trebled unpaid wages and \$144 is for liquidated unpaid
 15 overtime. (*Id.*); *see also* 29 U.S.C. § 216(b); A.R.S. § 23-355.

16 Of this \$2,736 total, Plaintiff is requesting that Defendant Custom Image Pros be
 17 liable for the entire amount, and all Defendants be jointly and severally liable for
 18 \$2,138.40.² Additionally, Plaintiff requests that these amounts be augmented further by
 19 post judgment interest pursuant to 28 U.S.C. § 1961. (*See* Doc. 11 at 12).

20 Default judgment “must not differ in kind from, or exceed in amount, what is
 21 demanded in the pleadings.” Fed. R. Civ. P. 54(c). Plaintiffs motion does not differ in kind
 22 or amount from what was pleaded in his complaint. (*See* Doc. 1 at 13–17); (Doc. 11 at 9–
 23 12). “The Court may enter a default judgment without a damages hearing when, as here,
 24 “the amount claimed is a liquidated sum or capable of mathematical calculation.” *Million*
 25 *v. Pindernation Holdings LLC*, No. CV-23-00072, 2023 WL 2813684, at *5 (D. Ariz. Apr.
 26 6, 2023) (quoting *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981)). In this action the
 27 requested damages are capable of mathematical calculation because they are comprised of

28 ² This amount consists of \$1,994.40 in treble unpaid wages and \$144 in liquidated unpaid
 overtime. (Doc. 11 at 10); *see also* 29 U.S.C. § 216(b); A.R.S. § 23-364(G).

1 hours worked by Plaintiff, the amount in pay he was entitled to receive, and statutory
 2 multipliers. *See id.* The Court finds that Plaintiff has sufficiently established the requested
 3 damages. (Doc. 11). Therefore, the Court will enter default judgment in the amount of
 4 \$2,736 against Defendant Custom Image Pros, with \$2,138.40 of that amount being held
 5 jointly and severally against all Defendants.

6 **IV. ATTORNEYS' FEES**

7 Lastly, the Court considers Plaintiff's request for attorneys' fees. Plaintiff requests
 8 that the Court allow him to file a motion for attorneys' fees and costs, should the Court
 9 grant default judgment. (*See* Doc. 11 at 11). Following this award of Default Judgment, the
 10 Court will allow Plaintiff to move for reasonable attorneys' fees pursuant to Local Rule of
 11 Civil Procedure 54.2.

12 **V. CONCLUSION**

13 Based on the foregoing,

14 **IT IS ORDERED** that Plaintiff's motion for default judgment, (Doc. 11), is
 15 **GRANTED**. The Clerk of the Court shall enter Judgment for Plaintiff Victor Perez Peralta
 16 and against Defendant Custom Image Pros, in the amount of \$597.60. Judgment shall also
 17 be entered in favor of Plaintiff in the amount of \$2,138.40 against all three Defendants,
 18 jointly and severally, plus post-judgment interest at the applicable statutory rate.³

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 25 ³ The Court has entered default judgment against "Jane Doe Simpson" at Plaintiff's request.
 26 The Court does not believe a judgment can be collected against a fictitious party, and this
 27 Order does not alter that reality. However, the Court will not spend any more time or effort
 28 on this default judgment to educate counsel on how to proceed procedurally. Plaintiff's
 29 counsel has already been instructed how to correctly proceed in these circumstances. *See*
Aguirre v. Custom Image Pros LLC, CV-419-PHX-ROS, Doc 13 (D. Ariz. Oct. 13, 2023)
 30 (explaining to Plaintiff's counsel how to seek default against Jane Doe Simpson
 31 specifically). Thus, if Plaintiff's counsel is satisfied with what appears to the Court to be
 32 an uncollectible judgment, the Court will not preclude the same.

1 **IT IS FURTHER ORDERED** that Plaintiff may submit a motion for attorneys'
2 fees as specified above within 14 days of this Order; a bill of costs may also be filed at that
3 time in accordance with Local Rule of Civil Procedure 54.1.

4 Dated this 5th day of December, 2023.


James A. Teilborg
Senior United States District Judge